

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA

v.

GANG CHEN,

Defendant.

No. 1:21-cr-10018-PBS

**GOVERNMENT’S MOTION FOR PRETRIAL CONFERENCE
PURSUANT TO CLASSIFIED INFORMATION PROCEDURES ACT
AND SUPPORTING MEMORANDUM OF LAW REGARDING STATUTORY
PROCEDURES FOR HANDLING OF CLASSIFIED INFORMATION
(ASSENTED TO)**

The United States of America, by and through undersigned counsel B. Stephanie Siegmann, Jason Casey, and Timothy Kistner, Assistant United States Attorneys for the District of Massachusetts, and David C. Aaron, Trial Attorney, U.S. Department of Justice, National Security Division, hereby apprises the Court of the applicability of the Classified Information Procedures Act, 18 U.S.C. App. III (CIPA), to matters relating to classified information that may arise in connection with the instant case, both before and during trial, and, with the assent of defendant Gang Chen, moves for a pretrial conference, pursuant to Section 2 of CIPA, to consider such matters. In support of its motion, the government submits the following memorandum of law to provide the Court with a detailed description of the procedures mandated by CIPA for protecting classified information.

The government also moves the Court for an Order designating a Classified Information Security Officer (CISO) to assist the Court and Court personnel in the handling of any motions pursuant to CIPA and implementing any orders relating to the matter. The CISO will also assist

in the processing of any necessary security clearances for the Court.¹ A proposed order designating a CISO is filed with this motion as Attachment A.

I. BACKGROUND

The indictment in this case charges the defendant with: (1) committing wire fraud by devising a scheme or artifice to defraud that involved concealing material information regarding his activities for the government of the People's Republic of China (PRC) from the U.S. Department of Energy in a grant proposal and related post-award progress report, in violation of 18 U.S.C. § 1343; (2) failing to file with the Commissioner of the Internal Revenue Service, U.S. Department of Treasury, a report of foreign bank and financial accounts disclosing that he had an interest in, and signature or other authority over, at least one bank account at the Bank of China in the PRC with an aggregate value of more than \$10,000 during the 2018 calendar year, in violation of 31 U.S.C. §§ 5314 and 5322; and (3) making a false statement on his 2018 federal income tax return (Form 1040) when he answered “no” to the question whether he had “a financial interest in or signature authority over a financial account ... located in a foreign country,” in violation of 18 U.S.C. § 1001(a)(2).

II. OVERVIEW OF THE CLASSIFIED INFORMATION PROCEDURES ACT

CIPA was enacted in 1980 to enable courts to evaluate potential classified information issues in criminal cases before jeopardy attaches. CIPA itself does not change the government's discovery obligations, and it does not alter the rules of evidence. Instead, CIPA mandates a number of procedures at the pretrial, trial, and appellate stages of a criminal case to enable courts to protect a defendant's right to due process, including the right to a fair trial, and to protect the government's interest in classified information, sources, and methods. This interest applies, *inter alia*, in both

¹ Any court personnel, including a Magistrate Judge, must receive an appropriate security clearance before receiving access to classified information.

the discovery and trial contexts. *See United States v. Anderson*, 872 F.2d 1508, 1514 (11th Cir. 1989) (“CIPA was enacted . . . to combat the problem of graymail, a practice whereby a criminal defendant threatens to reveal classified information during the course of his trial in the hope of forcing the government to drop the criminal charge” and provides “a procedural framework” for rulings before evidence is introduced in open court); *see also United States v. Sterling*, 724 F.3d 482, 515 (4th Cir. 2013) (CIPA “was designed to balance the defendant’s interest in a fair trial and the government’s interest in protecting national security information”); *United States v. Rezaq*, 134 F.3d 1121, 1142 (D.C. Cir. 1998) (discussing balance between national security and due process rights of the defendant); *see generally United States v. Dumeisi*, 424 F.3d 566, 578 (7th Cir. 2005) (CIPA’s fundamental purpose is to “protect and restrict the discovery of classified information in a way that does not impair the defendant’s right to a fair trial” (internal quotation marks and citation omitted)); *United States v. Sarkissian*, 841 F.2d 959, 965 (9th Cir. 1988) (“CIPA creates a pre-trial procedure for ruling upon the admissibility of classified information.”).

CIPA provides courts “with wide latitude to deal with thorny problems of national security in the context of criminal proceedings,” and “district courts must ultimately balance [the] ‘public interest in protecting the information against the individual’s right to prepare his defense.’” *United States v. Abu Ali*, 528 F.3d 210, 247 (4th Cir. 2008) (quoting *United States v. Smith*, 780 F.2d 1102, 1105 (4th Cir. 1985)). Notably, several Courts of Appeals have applied the “informant’s privilege” in *Roviaro v. United States*, 353 U.S. 53, 62 (1957), in the national security context because of the government’s “substantial interest in protecting sensitive sources and methods of gathering information.” *United States v. El-Mezain*, 664 F.3d 467, 520-21 (5th Cir. 2011) (citing Second, Fourth, and D.C. Circuits, and applying rationale in the Fifth Circuit); *Smith*, 780 F.2d at 1108.

Accordingly, CIPA sets forth procedures by which federal courts rule on pretrial matters concerning the discovery, admissibility, and use of classified information in criminal cases. *United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1363 (11th Cir. 1994). The fundamental purpose of CIPA is to “harmonize a defendant’s right to obtain and present exculpatory material [at] trial and the government’s right to protect classified material in the national interest.” *United States v. Pappas*, 94 F.3d 795, 799 (2d Cir. 1996) (internal quotes and citation omitted). It “evidence[s] Congress’s intent to protect classified information from unnecessary disclosure at any stage of a criminal trial.” *United States v. Apperson*, 441 F.3d 1162, 1193 n.8 (10th Cir. 2006) (internal quotes and citation omitted).

Section 1 of CIPA defines “classified information” as “any information or material that has been determined by the United States government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security.” “National security,” in turn, is defined as “the national defense and foreign relations of the United States.” 18 U.S.C. App. III § 1. CIPA applies equally to classified testimony and classified documents. *See United States v. North*, 708 F. Supp. 399, 399-400 (D.D.C. 1988); *Kasi v. Angelone*, 200 F. Supp. 2d 585, 597 (E.D. Va. 2002) (applying CIPA to classified testimony).

The Supreme Court has acknowledged the importance of protecting the nation’s secrets from disclosure, noting that “[t]he government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service.” *CIA v. Sims*, 471 U.S. 159, 175 (1985) (internal quotes and citation omitted). Accordingly, federal courts have long recognized that “[i]t is not in the national interest for revelation of either the existence or the product of [foreign intelligence operations and information] to extend beyond the narrowest limits

compatible with the assurance that no injustice is done to the criminal defendant” *United States v. Lemonakis*, 485 F.2d 941, 963 (D.C. Cir. 1973).

A. Section 2—Pretrial Conference

Section 2 of CIPA provides that “[a]t any time after the filing of the indictment or information, any party may move for a pretrial conference to consider matters relating to classified information that may arise in connection with the prosecution.” 18 U.S.C. App. III § 2. After such motion is filed, Section 2 requires the District Court to hold a pretrial conference to establish the timing of: (1) requests for discovery; (2) the provision of the requisite written pretrial notice by the defense to the government, pursuant to Section 5 of CIPA, of the defendant’s intent to disclose classified information; and (3) the initiation of procedures, pursuant to Section 6 of CIPA, concerning the use, relevance, and admissibility of classified information. *Id.* In addition, the court may consider any matters that relate to classified information, or that may promote a fair and expeditious trial. *Id.* No substantive issues concerning the use of classified information are to be decided in a Section 2 pretrial conference. *See* S. Rep. No 96-823, at 5-6 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4294, 4298-99. Moreover, to foster open discussions at the pretrial conference, Section 2 provides that no admission made by the defendant or his or her attorney at the pretrial conference may be used against the defendant unless the admission is in writing and signed by both the defendant and his or her attorney. *See* 18 U.S.C. App. III § 2.

B. Section 3—Protective Orders

Section 3 of CIPA provides that the court shall issue an order, upon the request of the United States, “to protect against the disclosure of any classified information disclosed by the United States to any defendant in any criminal case.” In addition to prohibiting such disclosure, protective orders issued under CIPA generally set forth rules for all parties governing the use and storage of classified information and provide for the appointment of a CISO who will assist the

court and the parties with the logistics and processes for producing, storing, filing, and handling classified information.

Section 3 was also intended to codify federal courts' well-established practice to issue protective orders based on courts' inherent authorities, as well as to supplement federal courts' authority under Rule 16(d)(1) to issue protective orders in connection with the discovery process. In contrast to the discretionary authority in Rule 16(d)(1), however, Section 3 of CIPA provides that, when classified information is involved, protective orders are to be issued whenever the government discloses classified information to a defendant in connection with a prosecution. *See* H.R. Rep. No. 96-831, part 1, at 26 (1980).

In this case, the government does not anticipate moving for a protective order pursuant to Section 3 of CIPA.

C. Section 4—Protection of Classified Information During Discovery

Section 4 of CIPA provides a procedural mechanism to protect classified information, sources, and methods, while simultaneously ensuring that the government is able to satisfy its discovery obligations. CIPA does not create any new right of discovery or expand the rules governing the admissibility of evidence. *El-Mezain*, 664 F.3d at 520; *see Dumeisi*, 424 F.3d at 578 (“CIPA does not create any discovery rights for the defendant.”); *United States v. Johnson*, 139 F.3d 1359, 1365 (11th Cir. 1998) (“CIPA has no substantive impact on the admissibility or relevance of probative evidence.”); *Smith*, 780 F.2d at 1106 (“The legislative history is clear that Congress did not intend to alter the existing law governing the admissibility of evidence.”).²

² *Smith* adopted the “relevant and helpful” standard discussed herein in the context of CIPA Section 6 determinations regarding the use, relevance, and admissibility of classified information. Other courts have since applied a similar standard to discovery of classified information under CIPA Section 4. *See, e.g., United States v. Amawi*, 695 F.3d 457, 469-70 (6th Cir. 2012); *United States v. Yunis*, 867 F.2d 617, 623-25 (D.C. Cir. 1989); *United States v. Drake*, 2011 WL 2175007, at *6 (D. Md. 2011) (unreported case).

Rather, CIPA applies preexisting general discovery law in criminal cases to classified information and restricts discovery of such information to protect the government's national security interests. *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1261 (9th Cir. 1998); *Baptista-Rodriguez*, 17 F.3d at 1363-64; *Yunis*, 867 F.2d at 621.

CIPA thus does not, and was not intended to, “expand the traditional rules of discovery under which the government is not required to provide criminal defendants with information that is neither exculpatory nor, in some way, helpful to the defense.” *United States v. Varca*, 896 F.2d 900, 905 (5th Cir. 1990) (emphasis added); see *United States v. McVeigh*, 923 F. Supp. 1310, 1314 (D. Colo. 1996) (“CIPA does not enlarge the scope of discovery or of *Brady*.”); see also *Abu Ali*, 528 F.3d at 247. Nor does CIPA provide that the admissibility of classified information be governed by anything other than the “well-established standards set forth in the Federal Rules of Evidence.” *Baptista-Rodriguez*, 17 F.3d at 1364 (citations omitted); see also *United States v. Khan*, 794 F.3d 1288, 1303 n.15 (11th Cir. 2015) (“CIPA does not alter the machinery of evidence law.”).

Accordingly, pursuant to Section 4, district courts have the opportunity to assess whether, and the extent to which, specified items of classified information should be disclosed. Specifically, Section 4 provides that “[t]he court, upon a sufficient showing, may authorize the United States to delete specified items of classified information from documents to be made available to the defendant through discovery under the Federal Rules of Criminal Procedure, to substitute a summary of the information for such classified documents, or to substitute a statement admitting the relevant facts that classified information would tend to prove.” 18 U.S.C. App. III § 4; see also *United States v. Sedaghaty*, 728 F.3d 885, 904 (9th Cir. 2013); *Rezaq*, 134 F.3d at 1142.

Similar to Federal Rule of Criminal Procedure 16(d)(1), which gives the district court the authority to “deny, restrict, or defer discovery or inspection, or grant other appropriate relief” for

“good cause,” Section 4 of CIPA authorizes the district court “upon a sufficient showing” to deny, or otherwise restrict, discovery by the defendant of classified documents and information belonging to the United States. 18 U.S.C. App. III § 4; *see, e.g., Rezaq*, 134 F.3d at 1142; *Yunis*, 867 F.2d at 619-25. The legislative history of CIPA makes clear that Section 4 was intended to simply clarify the district court’s power under Rule 16(d)(1) to deny or restrict discovery in order to protect national security. *See* S. Rep. No. 96-823, at 6, 1980 U.S.C.C.A.N. at 4299-4300; *see also United States v. Aref*, 533 F.3d 72, 78-79 (2d Cir. 2008).

Thus, if the district court determines that the classified information is either not “relevant to the determination of the guilt or innocence of the defendant[],” or “helpful to the defense,” or “essential to a fair determination of the cause,” it is within its authority to withhold disclosure of the information. *Smith*, 780 F.2d at 1110 (quoting with approval *United States v. Pringle*, 751 F.2d 419, 428 (1st Cir. 1984), and holding that defendant’s right to discovery must be balanced against public interest in nondisclosure); *see also Yunis*, 867 F.2d at 623 (“[A] defendant seeking classified information . . . is entitled only to information that is at least ‘helpful to the defense of [the] accused.’” (quoting *Roviaro*, 353 U.S. at 60-61)).

CIPA Section 4 also provides, similar to Rule 16(d)(1), that the government may demonstrate that the use of an alternative discovery procedure—such as deletion or substitution—is warranted. CIPA further specifically provides that the Government may make this showing *in camera* and *ex parte*. 18 U.S.C. App. III § 4; *see United States v. Campa*, 529 F.3d 980, 994-95 (11th Cir. 2008); *see also United States v. Mejia*, 448 F.3d 436, 457-58 & n.21 (D.C. Cir. 2006) (noting similarity to Federal Rule of Criminal Procedure 16(d)); *see generally United States v. Abu-Jihaad*, 630 F.3d 102, 140 (2d Cir. 2010); *Aref*, 533 F.3d at 81; *Yunis*, 867 F.2d at 622-23; *Sarkissian*, 841 F.2d at 965; *Pringle*, 751 F.2d at 427.

A security clearance at a given level is not sufficient to entitle any individual to access or receive national security information classified at that level. Rather, in addition to receiving a clearance after a favorable determination of eligibility and execution of a non-disclosure agreement, an individual must have a “need to know” the classified information at issue. *See* Exec. Order 13526 § 4.1(a)(3). “Need to know” is defined as “a determination within the executive branch . . . that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function.” *Id.* § 6.1(dd). Accordingly, even if defense counsel hold appropriate security clearances, it “does not mean that [they are] entitled to access the government’s classified filings.” *Sedaghaty*, 728 F.3d at 909. Likewise, while the defendant may be entitled to notice when the government initiates CIPA proceedings under Section 4 or 6, there is “no due process right to receive a description of materials in the government’s possession that are not discoverable.” *Id.* (citing *Mejia*, 448 F.3d at 458 (noting that, in the context of CIPA, as in other discovery in criminal cases, the defendant is “not entitled to access to any of the evidence reviewed by the court . . . to assist in his argument’ that it should be disclosed”))). Indeed, a district court considering a motion to withhold classified information “must first determine whether . . . the information at issue is discoverable at all.” *Sedaghaty*, 728 F.3d at 904. Only if the information is discoverable must the court then examine whether it is also relevant and helpful to the defense. *Id.* A defendant, however, may be permitted to file his or her own *ex parte* submission outlining his or her theory of the defense to aid the court in the review of any classified materials. *See id.* at 906 n.10; *see also* Dkt. 87, Order Granting Government’s *In Camera*, *Ex Parte* Motion in *United States v. Abdul-Latif*, CR11-0228JLR (W.D. Wash. 2012).

The government does not anticipate that this case will require proceedings under CIPA beyond Section 4.

D. Sections 5 and 6—Notice of Defendant’s Intent To Disclose Classified Information and Pretrial Procedures Regarding Admissibility

The government does not anticipate CIPA proceedings beyond Section 4. For the Court’s awareness, however, there are three critical pretrial steps in the handling of classified information under CIPA after such information has been provided to the defendant through discovery. First, Section 5 requires that the defendant specify the classified information he or she reasonably expects to disclose at trial. Second, the court, upon motion of the government, shall hold a hearing to determine the use, relevance, and admissibility of evidence that either party seeks to introduce. 18 U.S.C. App. III § 6(a). Third, following the Section 6(a) hearing and formal findings of admissibility by the court, the government may move to substitute an admission of relevant facts or summaries for the classified information the court rules to be admissible. 18 U.S.C. App. III § 6(c). *See, e.g., Baptista-Rodriguez*, 17 F.3d at 1363; *United States v. Collins*, 720 F.2d 1195, 1197-99 (11th Cir. 1983).³

E. Other Relevant CIPA Procedures

1. Section 7—Interlocutory Appeal

Section 7 permits the government to take an interlocutory expedited appeal to the appellate court if the district court: (a) authorizes the disclosure of classified information; (b) imposes sanctions for nondisclosure of classified information; or (c) refuses to issue a protective order sought by the government to prevent the disclosure of classified information. 18 U.S.C. App. III § 7(a). If an appeal is taken, trial shall not commence, or must be adjourned if already commenced, until the appeal is resolved. 18 U.S.C. App. III § 7(b). Such an appeal and decision does not affect

³ Because the government does not anticipate the need for proceedings pursuant to Sections 5 or 6, the processes those sections require are not described in detail herein. Upon the Court’s request, the government can provide a more detailed briefing regarding Sections 5 and 6.

the defendant's right to lodge a subsequent appeal of an adverse ruling by the trial court upon conviction. *Id.*

2. Section 9—Security Procedures

Section 9 of CIPA requires the Chief Justice of the United States, in consultation with the Attorney General, the Director of National Intelligence, and the Secretary of Defense, to prescribe rules establishing procedures to protect against unauthorized disclosure of any classified information in the custody of United States courts. 18 U.S.C. App. III § 9(a).

F. Request To Designate CISO

Pursuant to Section 2 of the Revised Security Procedures Established Pursuant to Pub. L. 95-456, 94 Stat. 2025, by the Chief Justice of the United States for the Protection of Classified Information (“Security Procedures”), the government requests that the Court designate a CISO in this case. While the government does presently intend to use any classified information as evidence in this case, classified information may be implicated by the government's discovery obligations and in pretrial litigation.

The government requests that the Court designate Harry J. Rucker III as the CISO for this case to perform the duties and responsibilities prescribed for CISOs in the Security Procedures. The government further requests that the Court designate the following persons as Alternate CISOs, to serve in the event Mr. Rucker is unavailable: Daniel O. Hartenstine, Matthew W. Mullery, Maura L. Peterson, Carli V. Rodriguez-Feo, and Winfield S. Slade.

III. CONCLUSION

As indicated above, because the government's discovery obligations may implicate classified information, the government respectfully moves for a pretrial conference, pursuant to Section 2 of CIPA, to establish a motion schedule relating to any classified information. The defendant has assented to this motion. Additionally, the government notes that some of the CIPA

sections outlined above may not be invoked or need to be addressed. Further, dependent upon future events and potential pretrial resolutions and proceedings, there may be no need for hearings pursuant to CIPA.

At the Section 2 pretrial conference, the government will provide the Court an estimate of the time necessary to conduct a complete review of any potentially relevant classified information. Based on that estimate, and taking into account that additional evidence may be discovered in this case, the government will request a schedule for the filing of motions pursuant to Section 4 of CIPA, relating to the deletion and/or substitution pursuant to a protective order of classified information otherwise subject to discovery under the Federal Rules of Criminal Procedure and Local Rules.

Respectfully submitted,

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Dated: February 18, 2021

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically on February 18, 2021, and thereby delivered by electronic means to all registered participants as identified on the Notice of Electronic Filing.

/s/ B. Stephanie Siegmann
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